

86-867 (1)

NO. 86 -

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOLO, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MILLER SESSION and ROSE SESSION,
Petitioners,

v.

I.T.O. CORPORATION OF AMERIPORT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. The New Jersey State Tort Claims Act, a comprehensive legislative program dealing with the waiver of the defense of sovereign immunity in tort actions against the State of New Jersey, provides that in tort actions against the State (a) the amount of any workmen's compensation benefits received by an injured claimant is to be made known to the Court and deducted from any damages awarded against the State, and (b) bars the payer of such workmen's compensation benefits from asserting a subrogation lien on any damages awarded the claimant. In these circumstances, was it not error for the Court below to rule --

(1) That a stevedore's lien for workmen's compensation benefits paid under the Longshoremen's and Harbor Workers' Compensation Act was not a subrogation

lien and could be asserted in an employee's damage action against the State of New Jersey; and

(2) That the settlement by a longshoreman of a damage claim against the State of New Jersey without his stevedore/employer's consent would authorize the stevedore/employer to terminate the payment of workmen's compensation benmefits?

2. Did not the Courts below err in ruling that the 1984 amendments to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act operated to change the stevedore's lien for compensation benefits paid an injured employee from a lien based on the principle of subrogation to a general statutory right of recovery?

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MILLER SESSION and ROSE SESSION,
Petitioners,

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I.T.O. CORPORATION OF AMERIPORT,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

To the Honorable, the Chief Justice and
the Associate Justices of the Supreme
Court of the United States

Petitioners, Miller Session and Rose
Session, respectfully pray that a Writ of
Certiorari issue to review the Judgment
Order of the United States Court of Ap-
peals for the Third Circuit entered on
August 6, 1986, affirming the Order of the

United States District Court for the District of New Jersey, which held that a stevedore's lien for compensation benefits paid pursuant to the Longshoremen's and Harbor Workers' Compensation Act no longer was a subrogation lien, and in support thereof represents as follows:

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, which is not yet officially reported, is reproduced in the Appendix hereto (1a). The opinion of the United States District Court for the District of New Jersey, is officially reported at 618 F. Supp. 325 (D.N.J. 1985), and is reproduced in the Appendix hereto (5a).

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third

Circuit was entered on August 6, 1986. Thereafter, on September 3, 1986, a Petition for Rehearing was denied (3a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

New Jersey Tort Claims Act
N.J.S.A. 59:9-2e

e. If a claimant receives or is entitled to receive benefits for the injuries allegedly incurred from a policy or policies of insurance or any other source other than a joint tortfeasor, such benefits shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award against a public entity or public employee recovered by such claimant; provided, however, that nothing in this provision shall be construed to limit the rights of a beneficiary under a life insurance policy. No insurer or other person shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee.

Longshoremen's and Harbor Workers'
Compensation Act
Section 33(f), 33 U.S.C. Sec. 933(f)

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys fees).

Section 33(g), 33 U.S.C. Sec. 933(g)

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under the Act, the employer shall be liable for compensation as determined in subdivision (f) only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

STATEMENT OF THE CASE

This is an action for a declaratory judgment brought by an employee -- here petitioner Miller Sessions -- to determine whether his employer -- here respondent I.T.O. Corporation of Ameriport (hereafter "I.T.O.") -- may assert a lien for workmen's compensation benefits paid to the employee against the employee's recovery in a third-party tort action brought against an agency of the State of New Jersey.

Petitioner's third-party tort action was brought against the South Jersey Port Corporation, an agency of the State of New Jersey, under the provisions of the New Jersey State Torts Claims Act, N.J.S.A. 59:1-1 et seq., a comprehensive statutory program dealing with the waiver of the defense of sovereign immunity by the State of New Jersey and its agencies. Under

this statutory program, the right to assert subrogation liens is expressly abolished; instead the benefit of payments from sources such as workmen's compensation payments inures to the State to reduce the State's liability for damages rather than being repaid to the employer, see N.J.S.A 59:9-2e.

The workmen's compensation benefits being paid to petitioner were being paid under the provisions of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. Sec. 901 et seq. Therefore, the action involves the interpretation of rights arising under the Longshoremen's and Harbor Workers' Compensation Act, and federal jurisdiction exists under 28 U.S.C., Sec. 1331.¹

The case was determined on

-
1. The District Court's characterization of the action as being a maritime tort action (5a) is patently incorrect.

petitioner's motion for summary judgment, the parties being in agreement that there was no dispute of material fact and that the issue was solely one of law. The operative facts are as follows:

Petitioner, Miller Session was injured on August 17, 1981, while working as a longshoreman for respondent, I.T.O., a stevedoring company. At the time I.T.O. was engaged in discharging cargo from a vessel that was docked at the Camden Marine Terminal in Camden, New Jersey. The Camden Marine Terminal is owned and operated by the South Jersey Port Corporation, a corporation formed and operated as an agency of the State of New Jersey.

Petitioner was injured while working on the pier, not on the vessel, his injuries being caused by a defective condition on the pier. However, since he was

injured while working in connection with the discharging of cargo from a vessel, he was entitled to receive, and in fact did receive and still is receiving workmen's compensation benefits from respondent, I.T.O., under the Longshoremen's and Harbor Workers' Compensation Act.

In 1972, the State of New Jersey had enacted the New Jersey State Tort Claims Act, N.J.S.A. 59:1-1, et seq., as a comprehensive statutory program dealing with the defense of sovereign immunity in tort actions against the State and its agencies. The Tort Claims Act contains numerous provisions dealing with the giving of notice of claims against the State and its agencies and governing the bringing of suits on such claims. Since the South Jersey Port Corporation is an agency of the State of New Jersey, tort claims against it are subject to the

provisions of the New Jersey State Tort Claims Act, supra.

Pursuant to the applicable provisions of the New Jersey State Tort Claims Act, petitioner gave notice to the South Jersey Port Corporation that he was claiming that his injuries in the accident of August 17, 1981, were caused by its negligence, and subsequently brought suit against the South Jersey Port Corporation to recover damages for his injuries.

Prior to the suit against South Jersey Port Corporation being reached for trial, a settlement conference was held before the Court. In these settlement discussions it was assumed that, pursuant to Section 9-2e of the New Jersey State Tort Claims Act, N.J.S.A. 59:9-2e, plaintiff's employer, I.T.O., would not be entitled to assert a lien for the compensation benefits which it had paid

and was continuing to pay to petitioner.

In this regard N.J.S.A. 59:9-2e provides:

"e. If a claimant receives or is entitled to receive benefits for the injuries allegedly incurred from a policy or policies of insurance or any other source other than a joint tortfeasor, such benefits shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award against a public entity or public employee recovered by such claimant; provided, however, that nothing in this provision shall be construed to limit the rights of a beneficiary under a life insurance policy. No insurer or other person shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee." (Emphasis supplied)

At the settlement conference, it was recommended that petitioner accept the sum of \$45,000.00 in settlement of his action against the South Jersey Port Corporation on the understanding that there would be no subrogation lien for the workmen's compensation payments he had received, and that petitioner would continue to be

entitled to receive compensation benefits from I.T.O. under the Longshoremen's and Harbor Workers' Compensation Act so long as he remained disabled. However, before completing the settlement, counsel for petitioner contacted I.T.O. to ascertain its position with respect to its compensation lien and its obligation to continue to pay compensation benefits in the event the third-party tort action was settled.

I.T.O. responded that, in its view, the New Jersey Tort Claims Act did not bar it from asserting a lien for benefits paid under the Longshoremen's and Harbor Workers' Compensation Act, and that it would treat any settlement of petitioner's third-party tort action as a settlement without its approval under Section 33(g) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 933(g),

and would immediately terminate the payment of compensation benefits.

It was to resolve this conflict between respondent's claimed right to assert a lien for its compensation payments, and the provision of the New Jersey State Tort Claims Act that the benefit of such payments should go to the State, that this suit for a declaratory judgment was brought.

The District Court, subsequently affirmed by the Court of Appeals, ruled in favor of I.T.O., holding (1) that I.T.O. could assert a lien for compensation payments made under the Longshoremen's and Harbor Workers' Compensation Act notwithstanding the provision of N.J.S.A. 59:9-2e abolishing the right to subrogation in actions governed by the New Jersey State Tort Claims Act, and (2) that petitioner's settlement of his third-party

tort action without I.T.O.'s approval would terminate I.T.O.'s obligation to continue to pay compensation benefits.

To reach these conclusions, the District Court recognized that it had to find that I.T.O.'s compensation lien was not a subrogation lien. Therefore, the Court began its reasoning by stating --

"Our holding does not comport with the rationale which led to the judicial establishment of the stevedore's lien." (18a) (Emphasis supplied)

By this simple phrase, the District Court cast aside this Court's holding in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74, 79, 63 L.Ed.2d 215, 221 (1980), and the decision in The Etna, 138 F.2d 37, 39-40 (3rd Cir. 1943), that the stevedore's lien was based on the principle of subrogation.

The District Court then stated that it was guided in its decision by the

holding in United States v. Lorenzetti, 467 U.S. 167, 81 L.Ed.2d 134 (1984)(21a), which led it find in the 1984 amendment to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act a statutory requirement permitting the employer to assert a compensation lien against any third-party recovery made by an employee (after the deduction of attorney's fees and costs of litigation)(17a). In this regard, Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1984 provides (the underlined portions show the changes added by the 1984 amendments):

"(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net

amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees)."

Although not stated with great precision, the District Court's holding is that the 1984 amendment to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act, and, in particular, the reference to "net amount recovered" (17a), operated to change the stevedore's lien from a subrogation lien under Bloomer and The Etna, to a general statutory right of recovery similar to the interpretation given to Section 8132 of the Federal Employees Compensation Act, 5 U.S.C. Sec. 8132, in Lorenzetti.

Overlooked in this rationale was the impact of the holding on the State of New Jersey, for if I.T.O.'s lien is not a subrogation lien, and if petitioner may

not retain his compensation benefits, then there is no duplicate payment to him to deduct from the State of New Jersey's liability for damages, which is correspondingly increased.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Decision Below --

- A. Is In Conflict With The Holdings In *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 63 L.Ed.2d 215(1980), and *The Etna*, 138 F.2d 37 (3rd Cir. 1943), That The *Stevedore's Lien* Is A Judicially Created Lien Based On The Principle Of Subrogation;
- B. Misapplies This Court's Decision In *United States v. Lorenzetti*, 467 U.S. 167, 81 L.Ed.2d 134 (1984);
- C. Misinterprets The Purpose Of The 1984 Amendment To Section 33(f) Of The Longshoremen's And Harbor Workers' Compensation Act; and
- D. Improperly Negates Section 9-2e Of The New Jersey State Tort Claims Act.

As previously set forth, supra pp.9-10, Section 9-2e of the New Jersey State Tort Claims Act, N.J.S.A. 59:9-2e, is specific in abolishing the right of subrogation in tort actions against the State of New Jersey and its agencies. This provision barring subrogation was the result of an expressed legislative

determination that, as between the State of New Jersey and its agencies, on the one hand, and a private employer or insurance carrier, on the other, the private employer or insurance carrier was in a better position to bear the expense of the employee's injury than was the State and, therefore, should not be relieved from that obligation at the expense of the State. Thus, the Comment to N.J.S.A. 59:9-2e states:

"Subrogation is prohibited in subparagraph (e) in an effort to limit the exposure to liability of public entities. This provision is consistent with the 'no duplicate benefits' approach in the act and reflects a recognition that profit-making insurance companies are in a better position to withstand losses which they contract for than are the already economically burdened public entities." (Emphasis supplied)

The decision below, by holding the the stevedore's lien is not a subrogation lien, thwarts this legislative policy, for

if the compensation payments have to be paid back to the employer, then the injured employee will not be in receipt of any "duplicate" payments to credit against his damage award against the State or State agency.

The Longshoremen's and Harbor Worker's Compensation Act does not contain any provision specifically granting an employer a lien on an employee's third-party recovery. However, it has long been established that such a lien exists based solely on the principle of subrogation. The leading case is The Etna, 138 F.2d 37 (3rd Cir. 1943), in which the Court stated, 138 F.2d at 39-40:

" . . . we think that appellant misconceives both the purpose and the scope of that provision and entirely ignores the right to subrogation which under equitable principles, attaches where one, not acting officiously, pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily responsible. . . .

"As we have seen, Sec. 33(a) gives the injured employee a right to elect either 'to receive . . . compensation or to recover damages against (a) third person' where the injury for which compensation becomes payable is the fault of a third person. But Sec. 33(a) does not provide that the employee shall have a right to both compensation from his employer and damages from responsible third persons."

The holding of The Etna that the compensation lien was based on the principle of subrogation, coupled with the idea that the employee was not entitled to receive a double recovery, has been cited in numerous subsequent cases, including, most recently, this Court's decision in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74, 63 L.Ed.2d 215 (1980), in which this Court noted:

" . . . the lower Courts, however, interpreted the Act to require that the stevedore be reimbursed for his compensation payment out of the sum recovered from the third party. Congress was understood not to contemplate double recovery on the longshoreman's part, and the

stevedore did not, therefore lose the right to reimbursement for its compensation payment. See, e.g., The Etna, 138 F.2d 37 (C.A. 3 1943);
. . . ."

In the instant case, the District Court declined to follow the authority of Bloomer v. Liberty Mutual Insurance Co., supra, and The Etna, supra, with the simple comment that its holding did "not comport with the the rationale which led to the judicial establishment of the stevedore's lien" (18a). However, such long standing authority interpreting an important federal statute such as the Longshoremen's and Harbor Workers' Compensation Act should not be lightly disregarded. The failure of both the Third Circuit and the District Court to follow the decisions in Bloomer and The Etna, coupled with the holding that the stevedore's lien no longer rests on the principle of subrogation, in and of

itself, is such a significant departure from prior law, as to warrant consideration by this Court.

The District Court stated that it was "guided" in its holding "by the case of United States v. Lorenzetti," supra (21a). In Lorenzetti, this Court held that Section 8132 of the Federal Employees' Compensation Act, 5 U.S.C. Sec. 8132, created a general right of recovery for the federal government of compensation benefits paid to injured employees from third-party damage recoveries which was independent of the principle of subrogation. Thus, in Lorenzetti, this Court noted, 81 L.Ed.2d at 142:

"Section 8132 does not confine the United States to the rights of a subrogee with respect to the specific classes of expenses paid by it to injured employees under FECA; instead, it expressly creates a general right of reimbursement that obtains without regard to whether the

employee's third-party recovery includes losses that are excluded from FECA coverage."

The Lorenzetti decision was not an expression of a broad judicial philosophy or policy; rather, as this Court was careful to indicate, it was simply a result mandated by the specific language of the statute which the Court was construing. Thus, this Court stated in Lorenzetti, 81 L.Ed.2d at 144:

"The Court of Appeals believed that allowing the United States to recover in this case would be inconsistent with Congress' declared intent that federal employees 'be treated in a fair and equitable manner' under the FECA and that the United States 'strive to attain the position of being a model employer. S Rep. No.93-1081, p.2 (1974). However useful these general statements of congressional intent may be in resolving ambiguities in the statutory scheme, they are not a license to ignore the plain meaning of a specific statutory provision." (Emphasis supplied)

The District Court, in stating that it was "guided" in its holding by the

decision in Lorenzetti, gave Lorenzetti a far broader reading than simply being an interpretation of Section 8132 of the FECA. Rather, the District Court appears to be viewing Lorenzetti as reflecting a judicial philosophy that in those instances where an employer's right to assert a compensation lien comes into conflict with tort reform legislation, such as the New Jersey Tort Claims Act, which would bar the right of subrogation as a means of rearranging the financial impact of accident compensation, the courts should endeavor to find an interpretation of the compensation act which would preserve the employer's right to assert a compensation lien.

Tort reform legislation, such as automobile no-fault legislation and enactments similar the New Jersey State Tort Claims Act, which seek to reduce

insurance costs by eliminating subrogation claims and allowing damage awards only for amounts in excess of an injured employees' compensation benefits, is becoming increasingly common. There is nothing in the Lorenzetti decision which suggests that it was intended to impede such developments in the absence of a clear statutory mandate to the contrary which, we submit, is not present here. To the extent that the decision below reflects an interpretation of the Lorenzetti decision as being antagonistic to such tort reform legislation, it reflects a misinterpretation of the Lorenzetti decision which should be corrected by this Court.

The crux of the decision below is the District Court's holding that the 1984 amendment to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act manifested a

Congressional intent to change the stevedore's compensation lien from a lien based on the principle of subrogation to a statutory general right of recovery analogous to Section 8132 of FECA as interpreted in the Lorenzetti decision. This holding is patently in error for several reasons.

Initially, it is significant that nowhere in the legislative history accompanying the amendment to Section 33(f) is there any mention of such a legislative intent, nor is there anything to suggest that Congress even recognized that it was enacting such a significant change in the nature of the compensation lien.

Secondly, it is abundantly clear that the amendment Section 33(f) was addressed to a far different problem -- a problem which arose in the wake of the Bloomer

decision. Bloomer had held that a longshoreman's attorney could not charge the stevedore with any part of his fees or costs incurred in recovering the compensation lien in a third-party action; rather, the entire lien had to be repaid to the stevedore from the proceeds of the third-party action before any distribution could be made to the injured longshoreman.

Following the Bloomer decision, cases came up where the third-party recovery was insufficient to satisfy both the attorney's fees and costs, and the stevedore's compensation lien, and the question came up as to who was to have priority of payment, i.e., would the stevedore be paid his lien first with whatever balance that remained going to satisfy attorney's fees and cost, or would the attorney's fees and costs be paid first with whatever balance that remained

going to the stevedore to satisfy its lien. The 1984 amendment to Section 33(f) resolved this problem by providing that the attorney's fees and cost would have priority of payment over the stevedore's lien. The history of this issue is set forth at length in Ochoa v. Employers National Insurance Co., 754 F.2d 1196 (5th Cir. 1985). There is absolutely no basis in the statutory language, legislative history or otherwise for concluding that the 1984 amendment to Section 33(f) was addressed to anything other than this particular problem.

Nor is the language of Section 33(f) "unambiguous" as stated in the District Court's opinion. First of all, Section 33(f) deals only with the employer's liability for compensation; it does not create a compensation lien. Secondly, unlike Section 8132 of FECA in the

Lorenzetti case, nowhere in the Longshoremen's and Harbor Workers' Compensation Act is there a statutorily mandated compensation lien. The only lien that has ever existed is the judicially recognized subrogation lien as set forth initially in the decision in The Etna, supra. Section 33(f) can and should be interpreted, and, indeed, only makes sense when interpreted as defining the employer's liability for compensation where a compensation lien is found to exist based on the principle of subrogation -- the only basis on which such a lien ever has been found to exist.

The decision below is based on a strained and illogical interpretation of Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act. It operates to negate an important aspect of tort reform legislation of the State of

New Jersey relating to the sovereign immunity of the State in tort litigation. It misapplies the rationale of this Court's decision in United States v. Lorenzetti, supra, and is in direct conflict with the decisions in Bloomer v. Liberty Mutual Insurance Co., supra, and The Etna, supra, which held that the stevedore's compensation lien was based on the principle of subrogation. The decision below impacts significantly on the rights of injured employees to bring third-party actions and on the State of New Jersey in tort actions brought against it. Accordingly, it is submitted that a Writ of Certiorari should issue to review all these issues.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the decision and judgment of the court below.

Respectfully submitted,

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Attorneys for Petitioners

EDITOR'S NOTE

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v.

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for the Third Circuit

APPENDIX TO THE PETITION
FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5691

MILLER SESSION and
ROSE SESSION, H/W

v.

I.T.O. CORPORATION OF AMERIPORT

MILLER SESSION and ROSE SESSION, H/W
Appellants

Appeal from the United States District
Court for the District of New Jersey
(D.C. Civil Action No. 84-2029)
District Judge: Hon. Mitchell H. Cohen

Argued: July 30, 1986
Before: HIGGINBOTHAM, Circuit Judge, and
GARTH, Senior Circuit Judge, and RE, Chief
Judge. *

*Honorable Edward D. Re, Chief Judge,
United States Court of International
Trade, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that, substantially for the reasons expressed in Judge Cohen's opinion, 618 F. Supp. 325 (D.N.J. 1985), the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

Attest:

/s/ Sally Mrvos

Sally Mrvos, Clerk

Dated: Aug. 6, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5691

MILLER SESSION and ROSE SESSION,
Appellants

v.

I.T.O. CORPORATION OF AMERIPORT

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ,
ADAMS, GIBBONS, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON and MANSMANN, Circuit Judges.

The petition for rehearing filed by Miller Session and Rose Session, appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A. Leon Higginbotham
Circuit Judge

Dated: Sep 3 - 1986

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

MILLER SESSION and : CIVIL ACTION
ROSE SESSION, his wife,
Plaintiffs, : -

vs. :

I.T.O. CORPORATION OF :
AMERIPORT,
Defendant. : NO. 84-2029

OPINION

COHEN, Senior Judge:

This maritime tort action, in which the plaintiffs seek only equitable relief, is presently before the Court on plaintiffs' motion for summary judgment. The primary plaintiff, Miller Session, is an injured longshoreman who is currently receiving workers' compensation benefits from his employer, the defendant herein, the I.T.O. Corporation of Ameriport (ITO). His wife alleges derivative damages and sues per quod. Essentially, Mr. Session,

who shall hereinafter simply be referred to as plaintiff, seeks a declaration that ITO is not entitled to be reimbursed for the statutorily mandated payments it made to plaintiff pursuant to the Longshoremen and Harbor Workers' Compensation Act (the Act or LHWCA), 33 U.S.C. Sec. 901 et seq., because these benefits do not duplicate the compensation for noneconomic losses which he has been offered by the South Jersey Port Corporation (SJPC) in settlement of a third party negligence action. Plaintiff's claim arises, therefore, under the LHWCA and vests this Court with subject matter jurisdiction pursuant to 28 U.S.C. Sec. 1331.

Because of the preliminary status of this case, its factual background has not been fully developed. Nevertheless, the facts are undisputed and, ultimately, are almost incidental to our disposition of

the present motion. All that need be known about the accident in question, which took place on August 17, 1981, is that the plaintiff was seriously injured when a stack of lumber, which had been unloaded from a vessel, fell on him. The plaintiff claims that his injuries were proximately caused by unsafe pier conditions and the negligence of its operators, the SJPC. Mr. Session has already received extensive medical treatment and compensation benefits of more than \$100,000.00. He is not entirely ambulatory and may well be permanently disabled.

Pursuant to its obligations under the LHWCA, ITO began paying workers' compensation benefits to the plaintiff shortly after Session's accident. In order to achieve a complete tort recovery, the plaintiff brought suit against the allegedly negligent third party, the SJPC.

In its answer, the marine terminal operator raised the uncontroverted defense that it is a "public entity" of the State of New Jersey within the meaning of the New Jersey Tort Claims Act, N.J.S.A. Sec. 59:1-1 et seq. As such, the SJPC is only liable to the plaintiff for those injuries which are not compensable from any other source.¹ See The Travelers Insurance Company v. Collella, 169 N.J. Super. 413, 404

1. In relevant part, the New Jersey Tort Claims Act provides:

- e. If a claimant receives or is entitled to receive benefits for the injuries allegedly incurred from a policy or policies of insurance or any other source other than a joint tortfeasor, such benefits shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award against a public entity or public employee recovered by such claimant; provided, however, that nothing in this provision shall be construed to limit the rights of a beneficiary under a life insurance policy. No insurer or other person shall be entitled to bring an action under a subrogation

A. 2d 1250 (App. Div. 1979) (workers' compensation insurer was not entitled to reimbursement from a public entity for benefits paid to injured employee). More specifically, the SJPC is not liable to the plaintiff for the costs of his medical, disability or rehabilitation expenses because these are recoverable under the LHWCA. See 18 U.S.C. Sections 906, 907 & 908.

On April 16, 1984, the Court convened a settlement conference between representatives of Mr. Session and the SJPC. At

(Footnote 1 continued)

provision in an insurance contract against a public entity or public employee.

N.J.S.A. Sec. 59:9-2(e) (West 1982).

It is clear that the SJPC is a "public entity" within the definition of the state act. See N.J.S.A. Sec. 59:1-3. See also S.E.W. Friel Company v. N.J. Turnpike Authority, 73 N.J. 107, 115-16 (1977). At oral argument, defendant's counsel agreed that this material fact is undisputed.

that time, Mr. Session agreed to accept a \$40,000 settlement offer from the SJPC on the condition that, pursuant to N.J.S.A. Sec. 59:9-2(e), there would be no subrogation claim for reimbursement asserted by ITO and that plaintiff's right to collect his workers' compensation payments would not be otherwise affected by the SJPC settlement. Upon learning of this proposed agreement, ITO indicated that it would not be willing to abide by these terms. Instead, the defendant herein claims that it is entitled to credit any amount Mr. Session receives from SJPC against its workers' compensation liability.

Although ITO has continued to pay compensation benefits to the plaintiff, its unwillingness to approve of plaintiff's proposed settlement with the SJPC and its stated intention to terminate the

plaintiff's benefits if he consummates the settlement without its consent, see 33 U.S.C. Sec. 933(g)(2), demonstrate the existence of a "definitive and concrete" dispute between parties with "adverse interests" thereby confirming this Court's ability to respond to plaintiff's request for declaratory relief. See ACandS, Inc. v. Aetna Cas. & Sur. Co., 666 F.2d 819, 822-23 (3d Cir. 1981). Thus, we proceed to explain our resolution of the novel issue presented by this case: Does a stevedore's lien, acquired by payment of statutory workers' compensation benefits, apply to any recovery (minus the costs of litigation) an injured longshoreman may obtain from a culpable third party even if the longshoreman clearly will not realize any double compensation by retaining both the statutory benefits and the third party damages? We hold that it does.

DISCUSSION

Like other workers' compensation statutes, the LHWCA employs a fundamental quid pro quo in that it mandates a reciprocal relinquishment of important legal rights. "Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the act." S. Rep. No. 428, 86th Cong., 1st Sess. 1, reprinted in 1959 U.S. Code Cong. & Ad. News 2134 (hereinafter cited as S. Rep. No. 86-428). See also Morauer & Hartzell, Inc. v. Woodworth, 439 F.2d 550, 552-53 (D. C. Cir. 1970). What seems somewhat atypical about the Act, or more particularly about its evolution, is the frequency with which Congress has responded to Supreme Court interpretations of the

Act by enacting subsequent amendments. Most of this interaction between the judiciary and legislature has taken place in regard to actions, like the one at bar, in which longshoremen (or employers subrogated to their rights) sue allegedly negligent third parties. Usually, these third parties are shipowners. In this case, no vessel contributed to plaintiff's injuries, however.

"[I]n the typical tripartite situation, the longshoreman is not only guaranteed the statutory compensation from his employer; he may also recover tort damages if he can prove negligence by the vessel." Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 530 (1980). Prior to the 1972 LHWCA amendments and by virtue of three Supreme Court decisions,² a long-

2. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), 549-50 (1960); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,

shoreman could obtain tort recovery from a vessel merely by proving that his injury was caused by an "unseaworthy" condition. The vessel could then recover from the longshoreman's employer by proving negligence.

The net result, in many cases, was to make the stevedore absolutely liable for statutory compensation in all cases and to deny him protection from additional liability in the cases in which his negligence could be established. The 1972 Amendments protect the stevedore from a claim by the vessel and limit the longshoreman's recovery to statutory compensation unless he can prove negligence on the part of the vessel.

Id. at 531 n.7.

Congress has also expressed its support of Supreme Court opinion which have construed the LHWCA. In Pallas Shipping Agency, Ltd. v. Duris, 461 U.S. 529 (1983), for example, the Court held that a

(Footnote 2 continued)

350 U.S. 124 (1956); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

longshoreman's acceptance of voluntary compensation payments did not constitute an acceptance of compensation "under an award in a compensation order." Id. at 532-39. Thus, an employee's voluntary acceptance of benefits did not trigger an assignment of his third party cause of action, which has only recently been made recoverable, to his employer. See 33 U.S.C. Sec. 933(b). In its 1984 LHWCA amendments, most of which became effective immediately, Congress adopted the Pallas Shipping holding. See H. Conf. R. No. 1027, 98th Cong., 2nd Sess. 36, reprinted in 1984 U.S. Code Cong. & Ad. News 2734, 2786 (hereinafter cited as H.C.R. No. 98-1027). The 1984 amendment that we find to be dispositive of this case was enacted in reaction to Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980). There, the Court held that the judicially estab-

lished stevedore's lien, which is at issue in this case, is not to be reduced by an amount representing an employer's proportionate share of the legal expenses a longshoreman encountered in obtaining a recovery from a third party. Id. at 85-88. Essentially, the Court applied the allocation scheme which Congress had specified for third party recoveries obtained by subrogated employers, see 33 U.S.C. Sec. 933(e), to a longshoreman's own action. A "review of the Act and its legislative history persuade[d] [the Court] that Congress intended the stevedore to recover the full amount of its lien, regardless of who brings the action." Bloomer, 445 U.S. at 87 n.14. In its 1984 Amendments, Congress rejected this conclusion.

The new section 33(f) of the LHWCA, which became effective on September 28,

1984 to all pending cases,³ provides that, in the event of an employee's third party recovery,

the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonably attorney's fees).

33 U.S.C. Sec. 933(f) (West Supp. 1985).

Thus, while reversing the specific holding in Bloomer and allowing employees to retain their entire costs of litigation, Congress has validated the attempt of the Court in Bloomer to negate the "sug-
gest[ion] that [a] stevedore's lien has priority over the longshoremen's ex-
penses." 445 U.S. at 74 n.13 (emphasis

3. See LHWCA Amendments of 1984, Pub. L. No. 98-426, Sec. 28, 98 Stat. 1639, 1655 (1984).

supplied). Specifically, Congress has directed that an employee must reimburse an employer for its workmen compensation payments with the net amount of his third party recovery and has defined his net amount to be "the actual amount recovered less the expenses [of litigation]." 33 U.S.C.Sec. 933(f) (Emphasis supplied). Thus, unless we find plaintiff's recovery from the SJPC for pain and suffering to be a cost of litigation, we cannot hold that it is excluded from the amount to be reimbursed to the defendant ITO. Of course, we must reject this absurd definition of pain and suffering. See, e.g., Dobbs, Remedies 544-45 (1st ed. 1973).

Our holding does not comport with the rationale which led to the judicial establishment of the stevedore's lien. In the seminal case of The Etna, 138 F.2d 37 (3d Cir. 1943), the Court held that the lien

was necessary in order to give effect to "the right of subrogation which, under equitable principles, attaches where one, not acting officiously, pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily responsible." Id. at 39. In support of its holding, the court cited Section 162 of the Restatement of Restitution. This provision states that equitable subrogation is employed in order to disallow unjust enrichment. Thus, The Etna has been credited with first articulating the proposition that a longshoreman may not retain, by virtue of a third party suit, a double recovery of full statutory compensation plus full damages in an action at law. See, e.g., Compagnie Generale Transatlantique, 443 U.S. 256, 270 n.25 (1979); Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669, 674 (9th

Cir. 1975). See generally Norris, The Law of Maritime Personal Injuries Sec. 95 at 171 n.17 (3d ed. 1975). Congress has, in the past, expressed only agreement with this proposition. See, e.g., S. Rep. No. 86-428 at 2; Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Cong., 2d Sess., 160, 371 & 720.

In the case at bar, there would be no double recovery if the plaintiff were permitted to retain both the \$40,000 offered by the SJPC, an amount specifically intended to compensate him for noneconomic losses (principally pain and suffering) for which compensation is not available under the LHWCA, and his statutory compensation for medical and subsistence expenses. Moreover, it is "the Judiciary [which] has traditionally taken the lead

in formulating flexible and fair remedies in the law maritime . . . " United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975). Nevertheless, we feel bound to apply the unambiguous language of Section 33(f) of the LHWCA and declare that the net proceeds of any settlement between the SJPC and the plaintiff would belong to the defendant ITO.

We are guided, in this holding, by the case of United States v. Lorenzetti, 52 U.S.L.W. 4655 (U.S. May 29, 1984), reversing 710 F.2d 982 (3d Cir. 1983). There, the Court held that a federal agent, who was injured in an automobile accident in Pennsylvania, had to reimburse his employer (the federal government) for payment made pursuant to the Federal Employees' Compensation Act (FECA) from his third party recovery even though the FECA payments had only compensated him for

economic losses and his third party recovery was limited, by the Pennsylvania No-Fault Vehicle Insurance Act, to non-economic losses like pain and suffering. Thus, in a setting which is almost perfectly analogous to the case before us,⁴ the Court ruled that the unambiguous lan-

4. There are some factual differences between Lorenzetti and the case at bar but none convinces us that a contrary holding would be proper. In both cases, the purpose of the statutory reimbursement provision was "to prevent double recoveries [and] minimize the cost of "workers" compensation programs to employers. 52 U.S.L.W. at 4658. In Lorenzetti, however, it was the employer's sovereign immunity which may have led the Court to construe the FECA (effectively a waiver of the same) narrowly. In the case at bar, it is the sovereign immunity of the third party, the SJPC, which will ultimately deprive the plaintiff of the full panoply of tort recoveries. We do not find this difference to be significant. In both cases, the holdings are products of unambiguous statutory provisions which, absent a clear expression of contrary legislative intent, are deemed conclusive. See, e.g., Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

We note, finally, that the case at bar does not present a conflict of state

guage of Section 8132 of the FECA was presumptively dispositive and that "[n]othing in FECA's legislative history [demonstrated] that Section 8132 means something less than what it says." Id. at 4658. The same is true of Section 33(f) of the LHWCA.

Section 33(f) of the LHWCA contains no ambiguity and there is also no question that Congress was aware of the possibility that a longshoreman might have to reimburse an employer for its compensation payments with damages recovered in a third party action for injuries that are not compensable under the LHWCA. To illus-

(Footnote 4 continued)

and federal law. The sovereignty of the states is as much a part of the federal constitutional plan as is the sovereignty of the federal government. See, e.g., Tribe, American Constitutional Law, Sec. 3-35 (1978). Thus, the LHWCA does not conflict with New Jersey's limited liability in a manner that would allow us to invoke the Supremacy Clause to ensure their peaceful coexistence.

trate the latter point, we quote the following passage from the House Committee's Report on the 1984 LHWCA amendments:

S. 38, as passed by the Senate, made changes to Section 33(f) of the current law, with respect to the disposition of the proceeds of a third party law suit which was brought by the employee or person entitled to compensation under this Act. The Senate bill provided that the entire amount recovered would be available to the employer's lien for compensation paid, or compensation to be paid under this Act. This provision concerned the Committee because of the uncertainty as to responsibility for payment of the attorneys' fees and litigation expenses associated with such suit, especially where the employer's lien equalled or exceeded the amount of the award or settlement achieved in the law suit. Accordingly, the House version clarifies this situation by specifically providing that the claimant/plaintiff's litigation expenses shall be paid from the recovery in the law suit before the employer's compensation lien would apply. The Committee also added a provision that after such litigation expenses are paid, a sum equal to 15% of the remaining recovery shall be provided to the claimant/plaintiff. Only the amount of such recovery which remains after payment of the claimant/plaintiff's litigation expenses and the 15% of net ater [sic] payment of such expenses

which is earmarked exclusively for the claimant/plaintiff would be available to satisfy the employer's compensation lien. The Committee very strongly believes that if the claimant bears the burden of bringing and sustaining a law suit, and succeeds in that suit, the claimant should "walk away from the courthouse" with some portion of the recovery in that suit. In the Committee's view, the law suit against the third party can be, and often is for damages which are not compensable under the workers' compensation system, such as pain and suffering, and loss of consortium. It is for this reason that the Committee believes some provision must be made to insure that the person bringing the law suit retain some of the proceeds of the suit, for damages for which he otherwise would not be compensated.

H.C.R. No. 98-1027 at 8. Notwithstanding the Committee's quoted concerns, Congress decided that it was only necessary to ensure that a longshoreman retain enough of his third party recovery to guarantee that he did not lose the costs (including attorneys' fees) of his third party litigation. See 33 U.S.C. Sec. 33(g). Congress apparently rejected the Committee's recommendation of a 15% ~~residual~~ accruing

to the longshoreman's benefit and we must, of course, give effect to this determination.

For all of the foregoing reasons, we hold that the defendant, ITO, is entitled to be reimbursed for the workers' compensation benefits which it has paid to the plaintiff from any recovery the plaintiff obtains from SJPC excepting the expenses reasonably incurred by the plaintiff in the third party litigation. Plaintiff's expenses do not include compensation for noneconomic losses such as pain and suffering.

In addition to declaratory relief, the plaintiff sought an order enjoining ITO from terminating its payment of benefits if Mr. Session settles his suit with SJPC without ITO's consent. See 33 U.S.C. Sec. 933(g). Given our previous determinations and ITO's obvious interest in the

proposed settlement, we will, of course, deny plaintiff's request for an injunction. The Court shall issue an appropriate order.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

MILLER SESSION and	:	CIVIL ACTION
ROSE SESSION, his wife,	:	
Plaintiffs,	:	
vs.	:	
I.T.O. CORPORATION OF	:	
AMERIPORT,	:	
Defendant.	:	NO. 84-2029

ORDER

This matter having come before the Court on a motion by the plaintiffs, MILLER SESSION and ROSE SESSION, for summary judgment regarding their requests for declaratory and injunctive relief, and

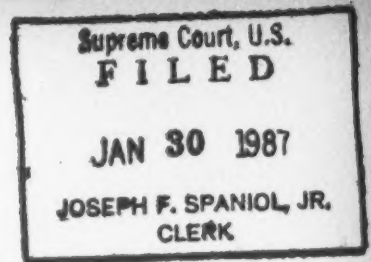
For the reasons set forth in this Court's opinion filed this day;

It is on this 20th day of September, 1985, ORDERED that the defendant is entitled to be reimbursed for its workers' compensation payments from any recovery the plaintiffs obtain from the South

Jersey Port Corporation excepting only plaintiffs' costs of litigation. Plaintiffs' request for an order enjoining the defendant from terminating said compensation benefits in the event that plaintiffs settle their suit with the South Jersey Port Corporation without defendant's approval is hereby DENIED.

/s/ Mitchell H. Cohen
MITCHELL H. COHEN, SENIOR JUDGE
UNITED STATES DISTRICT COURT

②
No. 86-867



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

MILLER SESSION and
ROSE SESSION,

Petitioners

v.

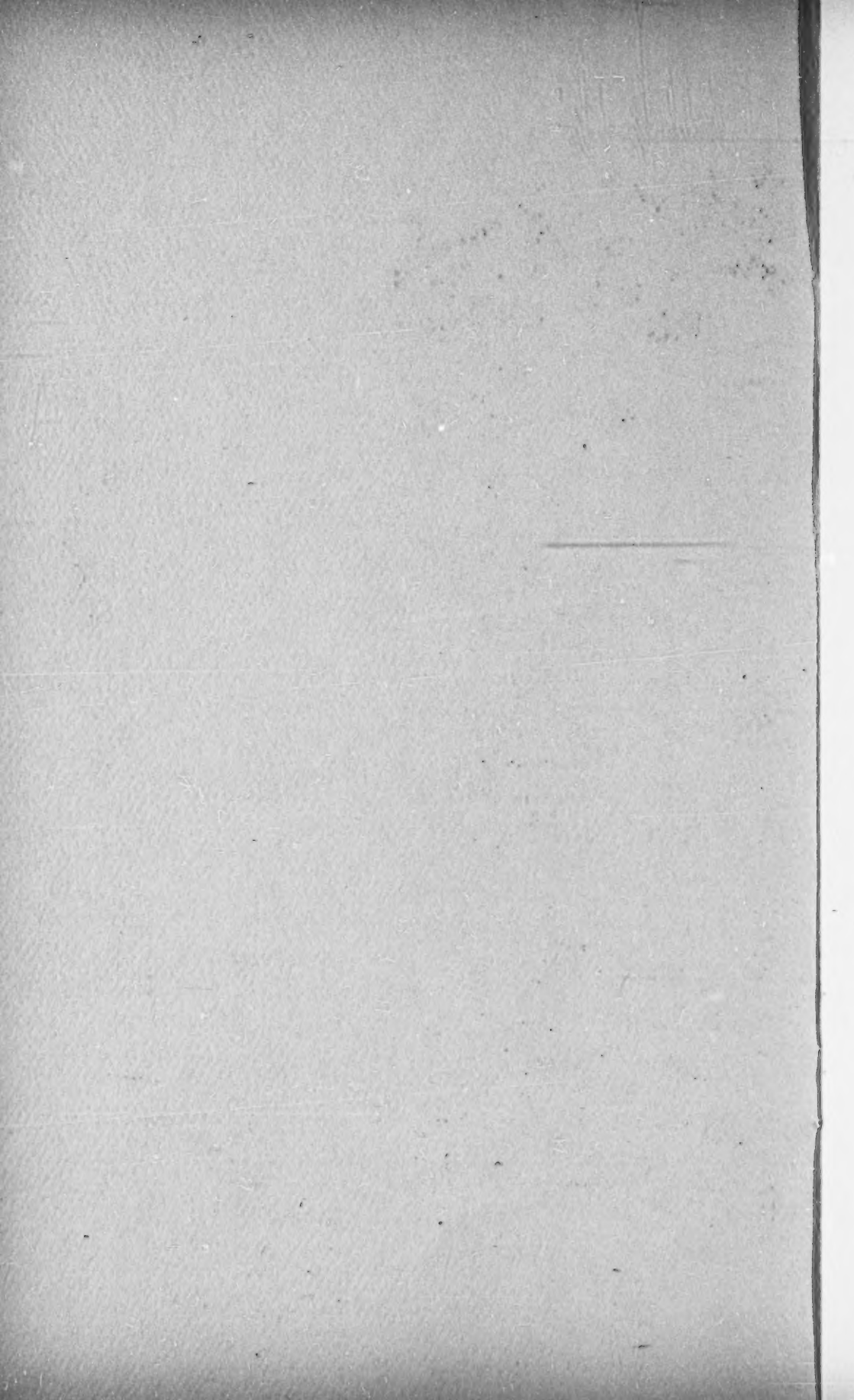
I.T.O. CORPORATION OF AMERIPORT,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

**RESPONDENT'S BRIEF
IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Does a stevedore have a statutory right to recover workers' compensation benefits, paid pursuant to the Longshoreman's and Harbor Workers' Compensation Act, from any recovery a longshoreman may obtain from a third party tortfeasor excepting the expenses reasonably incurred by the longshoreman in the third party litigation?

2. May a stevedore terminate payment of future compensation benefits if a longshoreman settles his suit against a third party tortfeasor without the stevedore's consent as required by 33 U.S.C. section 933(g)?

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No. 86-867

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1986

MILLER SESSION and
ROSE SESSION,
Petitioners

v.

I.T.O. CORPORATION OF
AMERIPORT,
Respondent

On Petition for a Writ of
Certiorari to the
United States Court of
Appeals for the Third
Circuit

RESPONDENT'S BRIEF IN
OPPOSITION TO THE
PETITION FOR A WRIT OF
CERTIORARI



STATEMENT OF THE CASE

Material Facts

On August 17, 1981, Petitioner, Miller Session, (hereinafter referred to as "Petitioner") who was employed as a longshoreman by Respondent, I.T.O. Corporation of Ameriport, (hereinafter referred to as "ITO") was injured while discharging cargo from a vessel docked at the Camden Marine Terminal in Camden, New Jersey. Following the accident, ITO began paying worker's compensation benefits to Petitioner pursuant to the provisions of the Longshoreman's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. section 901 et seq., (hereinafter referred to as the "LHWCA"). ITO has continued to make such payments up to the present.

On March 23, 1982, Petitioner brought an action in the United States District Court for the Eastern District of New Jersey against the South Jersey Port Corporation,

(hereinafter referred to as "SJPC") as operator of the Camden Marine Terminal, alleging that his injuries were caused by the negligence of SJPC. SJPC answered that it was a "public entity" of the State of New Jersey within the meaning of the New Jersey Tort Claims Act, N.J.S.A.

59:1-1 et seq. and among the defenses available to it under that Act is the defense that the public entity is entitled to take credit for payments made to an injured plaintiff by third parties, and that such third parties may not assert a right of subrogation against a public entity. Section N.J.S.A. 59:9-2e.

On April 16, 1984 Petitioner reached a tentative settlement agreement with SJPC which was contingent upon ITO's agreement that it would not assert its compensation lien and that Petitioner's future compensation rights would not be affected by the

settlement. However, ITO asserted that under the LHWCA and pertinent case law, it was entitled to recover from any settlement between SJPC and Petitioner the benefits it paid to Petitioner as a result of his injury. Furthermore, ITO noted that, under section 33(g) of the LHWCA, 33 U.S.C. section 933(g), any settlement made by Petitioner with SJPC without ITO's written consent would automatically terminate Petitioner's right to receive any future compensation after the settlement.

History of the Case

On May 25, 1984, Petitioner filed a Complaint in the United States District Court for the District of New Jersey seeking a declaratory judgment pursuant to 28 U.S.C. section 2201. Petitioner

alleged that there was a conflict between the provisions of the New Jersey Tort Claims Act and the LHWCA as they relate to ITO's subrogation rights for compensation payments made pursuant to the LHWCA. ITO filed an Answer and Jury Demand.

On January 22, 1985, Petitioner filed a Motion for Summary Judgment. ITO filed a Reply and a Memorandum of Law in opposition to Petitioner's Motion. Oral argument on the Motion was held before the Honorable Mitchell H. Cohen on May 3, 1985. On September 20, 1985, an opinion and Order were filed by the Court ordering that ITO is entitled to be reimbursed for its workers' compensation payments from any recovery Petitioner obtains from the SJPC excepting only Petitioner's costs of litigation. Additionally, the Court denied Petitioner's request for an order enjoining ITO from terminating compensation

benefits in the event that Petitioner settles his suit with SJPC without ITO's approval.

On October 18, 1985, Petitioner filed a Notice of Appeal with the District Court. Oral argument was held on July 30, 1986 in the United States Court of Appeals for the Third Circuit. A judgment Order was entered on August 6, 1986 affirming the judgment of the District Court. On September 3, 1986, a Petition for Rehearing was denied.

ARGUMENT

THIS CASE MEETS NONE OF THE STANDARDS OF REVIEW WHICH WOULD JUSTIFY A GRANT OF CERTIORARI.

This case was decided based on the district court's application of a federal statute, the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C.

section 901 et seq., (hereinafter referred to as the "LHWCA"). Petitioner seeks to establish a conflict between this decision and the decisions of this Court and a circuit court in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980), and United States v. Lorenzetti, 467 U.S. 167 (1984) and The Etna, 138 F.2d 37 (3rd Cir. 1943). Additionally, Petitioner argues that there is a conflict between this decision and the provisions of a state statute, the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. A review of the relevant case law and the pertinent state statute reveals that the decision of the district court is not inconsistent therewith.

I. THIS CASE INVOLVES THE PROPER APPLICATION OF A FEDERAL WORKERS' COMPENSATION STATUTE.

A stevedore's lien (acquired by payment of statutory workers' compensation benefits to a longshoreman) which was originally

a judicial creation, see, The Etna, supra, now has its foundation in legislation, see 33 U.S.C. section 933(f). The Etna court predicated its creation of the stevedore's lien on the equitable principles of unjust enrichment and double recovery. In Bloomer, the Court refused to reduce the stevedore's lien by its proportionate share of the longshoreman's legal expenses incurred in an action against a third party tortfeasor. Two important factors substantiate the position that The Etna and Bloomer are not in conflict with the holding in the instant case: (1) neither case addressed the factual situation where the recovery against the third party was less than the sum of the lien and the expenses of suit or the accompanying issue of priority of distribution, and (2) the 1984 amendment to the LHWCA which the lower court found dispositive of the

instant case (App. 12a), 33 U.S.C. section 933(f), was enacted subsequent to these decisions. The district court recognized "the frequency with which Congress has responded to Supreme Court interpretations of the Act by enacting subsequent amendments". (App. 12a - 13a). Thus, the 1984 amendments to the LHWCA specifically addressed the issue in this case and were correctly applied by the lower court.

The legislative history of the 1984 amendments to the Act elucidates Congress' intention regarding distribution of proceeds from a third party action brought by a longshoreman where the longshoreman's third party recovery was equal to or less than the amount of the stevedore's lien. As noted by Senator Hatch, the House and Senate versions of the amendment to Section 933(f) were very different:

The Senate bill amended Section 33(f) to establish that compensation paid by an employer shall be a first lien on any proceeds obtained by an employee in a tort suit against a third party. Implicit in this proposal was that the legal expenses of the employee, including attorney fees, would be totally subordinated to the compensation lien. The House amendment essentially reversed the order of priority. It would have permitted the employee to pay his attorney fees and litigation expenses first, before satisfaction of the compensation lien. This would be important where an employer's lien equalled or exceeded the amount recovered in the third party action. The House committee was concerned that an employee might conceivably be worse financially after incurring the expense of a suit than if he never had brought an action at all. In addition, the House committee believed that the employee was entitled to shelter a portion of recovery [15 percent] from any compensation lien. That committee viewed the 15 percent set-aside as comparable to the employer's right under section 33(e)(2) to retain 20 percent of any recovery in excess of litigation expense and compensation liability.

The conference agreement adopts a middle ground. First, it rejects the 15 percent set-aside in the House amendment and modifies current law by eliminating the employer's 20 percent set-aside in Section 33(e)(2). Second, it requires that the employee's

litigation expenses including reasonable attorney fees, be paid out of any recovery prior to the satisfaction of the compensation lien. It should be stressed though how this rule has special application in the cases where the aggregate of the litigation expenses, the employee's legal fees, and the compensation lien leave the employee with little, if any, recovery. In such circumstances, the conferees found merit in the approach articulated by the Court in Ochoa v. Employers National Insurance Company, 724 F.2d 1171 (5th Cir. 1984). That case held that where an employee's third party recovery was insufficient to cover both his attorney fee and the compensation lien, the lien was payable out of the net recovery, after costs of litigation, including reasonable attorney fees, were subtracted. The court of appeals emphasized that only reasonable attorney fees were allowed. Thus, where the recovery is insufficient to cover both the attorney fees and the compensation lien, leaving the employee with nothing, the court must evaluate the reasonableness of the fees and make an equitable adjustment as between the employee and his attorney. As noted in Ochoa, this approach attempts to do justice to the employee while upholding Bloomer v. Liberty Mutual Insurance Company, 445 U.S. 74 [100 S.Ct. 925, 63 L.Ed.2d] (1980), which forecloses an adjustment of an employer's lien in order to underwrite the attorney fees of the employee.

130 Cong. Rec. S11, 626 (daily ed. Sept. 20, 1984) (remarks of Senator Hatch).

In the House Conference Report, the Committee of Conference summarized the compromise over Section 933(f) as follows:

The Conference substitute establishes the following priority for distribution of proceeds in a recovery by an employee: first, the litigation expenses, including reasonable attorney fees, are satisfied. This may require that the Court exercise its discretion to adjust the attorney fee to assure equity for both the employee and his attorney. The compensation lien on the net recovery remains inviolable, consistent with Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980).

House Conference Report No. 98-1027, P. 36. See generally 1984 U.S. Code Cong. and Admin. News, pp. 2734-2787.

A review of the legislative history of Section 933(f) leaves no doubt as to the intention of Congress in providing for the

recovery by a stevedore of benefits already paid under the Act. Regardless of the roots of the stevedore's lien, it is clear that it is now a statutorily based right of recovery.

This decision does not, as Petitioner suggests, misapply this Court's decision in United States v. Lorenzetti, 467 U.S. 167 (1984). Lorenzetti involved a different federal statute and was used as guidance, rather than authority, by the lower court.

Finally, as interpreted and applied by the lower court, the LHWCA is not in conflict with the New Jersey Tort Claims Act. This decision does not negate the subrogation preclusion provision of the state statute. Given that the stevedore's lien is a statutory right to recover, and no longer a judicially created lien based on principles of subrogation, the New

Jersey Tort Claims Act is not relevant to the situation present before this Court. Respondent's claim is directly against petitioner's recovery.

II. THE PETITIONER'S REQUEST FOR INJUNCTIVE RELIEF WAS PROPERLY DENIED IN ACCORDANCE WITH THE CLEAR LANGUAGE OF 33 U.S.C. SECTION 933(g).

Section 933(g) of the LHWCA provides that a stevedore may terminate its payment of future compensation benefits if a longshoreman settles his suit with a third party tortfeasor without the stevedore's prior written approval. Given the stevedore's obvious interest in the longshoreman's settlement, the lower court correctly applied the statute where Respondent did not consent to Petitioner's proposed settlement.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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(3)
NO. 86 - 867

Supreme Court, U.S.
FILED

FEB 3 1987

JOSEPH E. SPANIO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MILLER SESSION and ROSE SESSION,
Petitioners,

v.

I.T.O. CORPORATION OF AMERIPORT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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<p>The Etna, 138 F.2d 37 (3rd Cir. 1943)</p>	<p>3, 4</p>
<p>Ochoa v. Emplyers National Insurance Co., 754 F.2d 1196 (5th Cir 1984)</p>	<p>2</p>

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<p>Section 33(f), 33 U.S.C.</p>	
<p>Section 933(f)</p>	<p>1, 2</p>

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Respondent asserts that, by reason of the 1984 amendment to Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 933(f), the "stevedore's lien is a statutory right to recover, and no longer a judicially created lien based on

principles of subrogation" (Brief in Opposition, page 12). However, respondent does not identify what, if any, statutory language in Section 33(f) accomplishes this metamorphosis.

It is abundantly clear that the 1984 amendment to Section 33(f) was addressed to the issue of the priority of payment of legal fees and expenses in relation to repayment of the stevedore's lien, see Ochoa v. Employers National Insurance Co., 754 F.2d 1196 (5th Cir. 1985). Abandonment of the principle of subrogation as the underlying basis for the lien is not mentioned in the legislative history, and there is absolutely nothing in the statutory language to suggest that Congress intended to discard the principle of subrogation as the basis for the lien.

Respondent's assertion that the decision in the instant case is not in

conflict with the decision in The Etna, 138 F.2d 37 (3rd Cir. 1943), and Bloomer v. Liberty Mutual Insurance Company, 445 U.S. 74, 63 L.Ed.2d 215 (1980), ignores the admission in the lower court's opinion that --

Our holding does not comport with the rationale which led to the judicial establishment of the stevedore's lien. (18a) (Emphasis supplied)

Nor is there any merit in respondent's efforts to distinguish the instant case from The Etna or Bloomer. The fact that Section 33(f) was amended subsequent to the decisions in The Etna and Bloomer would be meaningful only if there was language in the statute as amended, or in the legislative history relating to the amendment, indicating a rejection of these decisions. As previously noted, there is no such language.

Nor does the fact that neither Bloomer nor The Etna involved situations where the third-party recovery was less than the combined lien and attorney's fees present a basis for distinguishing the instant case. The instant case has not yet been settled. The recovery in the instant case has not yet been determined. If the decision below is allowed to stand, petitioners will go back to the District Court and try their case against the South Jersey Port Corporation. In that trial they will prove their full medical expenses and full loss of wages. Assuming they recover a verdict, that verdict will have to be paid in full by the South Jersey Port Corporation without deduction for the compensation payments made by respondent, for petitioners, having to repay them, no longer will be in receipt of them. If the decision below is

allowed to stand, the loser will not be petitioner, but rather will be the State of New Jersey whose efforts to reduce its tort liability will have been thwarted.

Respectfully submitted,

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